In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 101

TILLIE BLUM, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 55-60) are reported at 10 T.C. 1131. The opinion of the Court of Appeals (R. 75-80) is reported at 187 F. 2d 177.

JURISDICTION

The judgment of the Court of Appeals was entered on February 9, 1951 (R. 81). A petition for rehearing (R. 83-94) was filed on March 6,

1951, and was denied on March 21, 1951 (R. 95). The petition for a writ of certiorari was filed on June 7, 1951. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

The taxpayer and her husband entered into a written agreement on February 27, 1935, incident to a pending divorce action. The agreement provided that the husband should pay $120,000 to the taxpayer in stipulated annual installments, with the final installment to be paid on March 1, 1945. A divorce decree, which approved this agreement, was signed by the judge on February 28, 1935, and was entered of record on March 2, 1935.

Section 22(k), Internal Revenue Code, provides that installment payments of a lump sum alimony obligation are taxable to the wife if payable within a period ending more than 10 years from the date of the divorce decree or of a written instrument incident to the divorce.

The question is whether the Court of Appeals erred in holding that the installment payments here were taxable to the taxpayer since they were payable within a period of more than 10 years, as described in Section 22(k).

STATUTE INVOLVED

The pertinent provisions of the statute involved are set forth in the Appendix, *infra*.

STATEMENT

This case involves an asserted deficiency in personal income taxes for the calendar years 1942-1944, inclusive. A portion of the facts was stipulated (R. 12-37), and a portion was adduced by testimony (R. 39-54). The material facts may be summarized as follows:

Harry Blum, who had been married to the taxpayer since 1914, started an action for divorce in 1932 in Cook County, Illinois. The taxpayer filed an answer and a cross-bill in January, 1933, asking for separate maintenance. She filed an amendment to her cross-bill in 1935 in which she asked for a divorce, instead of separate maintenance. (R. 55.)

On February 27, 1935, the taxpayer and Harry Blum entered into a written agreement which was incident to the pending divorce action. (R. 12, 14-21, 55.) This agreement recited that the wife had filed her amended cross-bill seeking a divorce on February 27, 1935 (R. 15). After providing that it was to be effective only in the event that a decree of divorce should be granted (R. 15-16), the agreement specified, among other things, that Harry Blum was to pay to the taxpayer the sum of $120,000, payment to be made by nine annual installments of $7,500 beginning on March 1, 1936, and with a final installment of $52,500 to be paid on or before March 1, 1945 (R. 16). The agreement also provided that the husband was to pay interest at the rate of five percent on the $120,000

and any balance remaining unpaid. The payments to the taxpayer were to continue regardless of the death of either party, and regardless of the remarriage of the taxpayer. Harry Blum was to pledge security for the payment of the $120,000. The agreement was to be made a part of the decree of divorce. (R. 56.)

A divorce was granted to the taxpayer on her amended cross-bill. The uncontradicted testimony of the attorney who had represented Harry Blum in the divorce action was that the decree was signed by the divorce judge in his chambers on February 28, 1935. (R. 49-53.) The divorce decree was entered of record on March 2, 1935. (R. 56.) The decree referred to the written agreement of February 27, incorporated it by reference, and ordered the parties to carry out its terms. (R. 25, 56.)

Harry Blum paid to the taxpayer the $120,000, together with interest, in varying annual payments, a final payment of $33,000 being made on March 1, 1945. (R. 13, 56.) During the taxable years 1942-1944, inclusive, he paid her the respective amounts of $13,000; $8,000; $12,000, exclusive of interest. (R. 56.) The Commissioner determined deficiencies in her tax returns on the ground that these amounts were includible in her taxable income under Section 22(k), Internal Revenue Code. (R. 57.) The Tax Court refused to sustain the Commissioner's deficiency determinations. (R. 58-60.) The Court of Appeals (which had previously re-

versed the Tax Court and had held that the amounts here in controversy were deductible by the husband (*Harry Blum* v. *Commissioner*, 177 F. 2d 670)) reversed the Tax Court and held that these amounts were taxable to the wife. (R. 75-80.)

ARGUMENT

Sections 22(k) and 23(u), Internal Revenue Code (Appendix, *infra*), provide a statutory pattern for taxing certain alimony payments to the divorced wife rather than to her former husband. Section 22(k) provides that, where the wife has been divorced under a decree of divorce, periodic payments subsequently made to her in discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by the husband under the divorce decree or under a written instrument incident to the divorce, shall be includible in the gross income of the wife. Section 23(u) provides that the husband, in computing his net income, may deduct the payments made to the wife which are includible in her income under Section 22(k).

In defining the kind of periodic payments which are taxable to the wife, Section 22(k) makes an exception with respect to a principal sum which is payable in installments—these are not considered as periodic payments which are includible in the wife's income. However, Section 22(k) expressly provides that such installment payments shall be considered as periodic payments (and therefore

taxable to the wife) if the principal sum "by the terms of the decree or instrument, may be or is to be paid within a period ending more than 10 years from the date of such decree or instrument * * *."

The controversy below turned on the applicability of the above-quoted portion of the statute:—namely, were the installments of the principal sum involved here payable within a period ending more than 10 years from the date of the decree or written instrument incident to the divorce and, accordingly, taxable to the wife as periodic payments under Section 22(k). There can be no question that Section 22(k) is applicable in all other respects since the parties were divorced under a decree of divorce, the payments were received by the taxpayer wife subsequent to the decree, and the payments were in discharge of a legal obligation which, because of the marital relationship, was incurred by the husband under a decree of divorce or under a written instrument incident to the divorce.[1]

On the narrow question presented to it, the court

[1] Since this case did not involve payments made before the date of the decree or before an obligation was imposed on the husband, the taxpayer is plainly wrong in asserting that the court below held that Section 22 (k) can apply before the date on which the wife is divorced and that it can apply before the husband incurs any obligation under the decree or written instrument. (Pet. 7, 10-11.) That the court below is fully cognizant of the necessity of a decree of divorce under Section 22 (k) is evident from its decision in *Terrell* v. *Commissioner*, 179 F. 2d 838 (C.A. 7th), certiorari denied, 340 U.S. 822. The taxpayer's discussion of these particular requirements of Section 22 (k), which occupies a considerable portion of the petition, but which is extraneous to this case (Pet. 7-11, Br. 14-17), does not require further comment.

below held that the payments in question were taxable to the wife as periodic payments within the purview of Section 22(k), since the written instrument incident to the divorce was dated February 27, 1935, and since the installments could be and were paid within a period ending more than 10 years from the date of the instrument, namely, on March 1, 1945. Its decision is in harmony with its earlier decision in *Harry Blum* v. *Commissioner,* 177 F. 2d 670 (C.A. 7th), where, in reversing the Tax Court, it was held that the very payments which are here in question were not taxable to the taxpayer's former husband.

There are no conflicting decisions requiring resolution by this Court. *Harris* v. *Commissioner,* 340 U.S. 106, which the taxpayer claims is opposed to the decision below (Pet. 11-12, Br. 18), involved different statutory provisions and totally different problems. As the court below said (R. 80): "the *Harris* case has no proper application to the cause here under review." *Harris* was a gift tax case involving a post-nuptial property settlement agreement (as distinguished from an agreement respecting alimony) which was approved in a divorce decree. The question was whether the payments were taxable as gifts because not made for an adequate and full consideration in money or money's worth. This Court concluded that the payments were made pursuant to the divorce decree rather than under the written instrument, in the particular circum-

stances of that case, and that Congress did not intend to tax such transfers as gifts.

The selection of the spouse who should bear the burden of the income tax on alimony payments is patently different from the question of the *Harris* case whether a gift tax is to be imposed at all on transfers which represent an unraveling of the spouses' property interests. Congressional intent with respect to the latter has little to do with the former, particularly since Congress had made it crystal clear that the income tax must be paid by someone, for if the alimony payments are not taxable to the wife, no deduction is available to the husband. Moreover, in the *Harris* case the gift tax liability turned on whether the transfers were made pursuant to the agreement of the parties or pursuant to the divorce decree. The income tax liability of a wife under Section 22(k), however, is not dependent on such a distinction, for that section applies with equal force to payments made pursuant to a divorce decree or pursuant to a written instrument incident to the divorce. Thus, what was a crucial distinction in *Harris* is a matter of indifference under Section 22(k). Furthermore, on the narrow question presented by this case, namely, what is the starting point for measuring the arbitrary 10 year period by which Congress described those periodic installment payments of alimony which are to be taxed to the wife, Section 22 (k) sets forth its own standard. Since that section

expressly provides that the 10 year period is to begin either from the date of the decree or from the date of the written instrument, the *Harris* case has no controlling significance in determining when Congress intended the period should start its measurement.

The taxpayer, accordingly, is plainly mistaken in asserting a conflict between the decision below and *Harris* v. *Commissioner,* 340 U.S. 106, as a basis for invoking the granting of certiorari. There are, moreover, no other decisions which can be regarded as in conflict with the lower court's application of Section 22(k).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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JULY, 1951.

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CITATIONS

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APPENDIX

Internal Revenue Code:

SEC. 22. GROSS INCOME.

* * * * *

(k) [as added by Section 120(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Alimony, etc., Income.*—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. * * * Installment payments discharging a part of an obligation the principal sum of which is, in terms of money or property, specified in the decree or instrument shall not be considered periodic payments for the purposes of this subsection; except that an installment payment shall be considered a periodic payment for the purposes of this subsection if such principal sum, by the terms of the decree or instrument, may be or is to be paid within a period ending more than 10 years

from the date of such decree or instrument, but only to the extent that such installment payment for the taxable year of the wife (or if more than one such installment payment for such taxable year is received during such taxable year, the aggregate of such installment payments) does not exceed 10 per centum of such principal sum. For the purposes of the preceding sentence, the portion of a payment of the principal sum which is allocable to a period after the taxable year of the wife in which it is received shall be considered an installment payment for the taxable year in which it is received. * * *

* * * * *

(26 U.S.C. 1946 ed., Sec. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(u) [as added by Section 120(b) of the Revenue Act of 1942, *supra*] *Alimony, Etc., Payments.*—In the case of a husband described in section 22(k), amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22(k) or section 171, stated to be not includible in such husband's gross income, no deduction shall be allowed

with respect to such payment under this subsection.

* * * * *

(26 U.S.C. 1946 ed., Sec. 23.)

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